INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Questions presented	3
Statement	4
Summary of argument	8
Argument	12
I. The indictment properly charged a conspiracy to defraud the United States	12
A. Although it was part of petitioners' conspiracy to commit statutory offenses, they could properly be charged with conspiring to defraud the United States	12
B. Petitioners' conspiracy involved fraud because they agreed to make material misrepresentations and thereby obtain services to which they were not entitled	18
C. If there was error in charging petitioners, it was nonprejudicial	22
II. Petitioners' convictions are not invalid on constitutional grounds	24
A. Petitioners' convictions for conspiring to defraud the government are valid irrespective of the constitutionality of Section 9(h)	26
B. Section 9(h) is neither a bill of attainder nor an impermissible infringement on First and Fifth Amendment liberties	33
III. The district court's rulings on petitioners' motions regarding witnesses' grand jury testimony did not constitute reversible error	38
A. Defendants have no absolute right to examine a witness' grand jury testimony	39

212-183—66——1

Argument—Continued
III. The district court's rulings etc.—Continued
B. Whether to examine grand jury minutes "in camera" is a discretionary decision to be made by the trial court on an evaluation of all the circumstances... Page 42
C. In the circumstances of this case, the judge's refusal to examine the grand jury minutes "in camera" was not error... 44
D. If this Court disagrees with the court of appeals' evaluation of the effect of the district court's ruling, it should permit the district judge now to examine the grand jury testimony "in camera"... 51
Conclusion... 52

CITATIONS

Cases:

American Communications Association v. *Douds*, 339 U.S. 382... 25, 29, 33, 34
Aptheker v. *Secretary of State*, 378 U.S. 500... 10, 33, 35, 36, 37
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288... 32
Boehm v. *United States*, 123 F. 2d 791, certiorari denied, 315 U.S. 800... 28
Braverman v. *United States*, 317 U.S. 49... 23
Bridges v. *United States*, 346 U.S. 209... 8, 15, 16, 17
Brown v. *Elliot*, 225 U.S. 392... 17
Campbell v. *United States*, 365 U.S. 85... 52
Carter v. *Texas*, 305 U.S. 557, dismissing appeal from 135 Tex. Crim. 457, 116 S.W. 2d 371... 28
Culp v. *United States*, 131 F. 2d 93... 18
Fahey v. *Mallonee*, 332 U.S. 245... 32
Frohwerk v. *United States*, 249 U.S. 204... 23
Glasser v. *United States*, 315 U.S. 60... 13, 14
Glickstein v. *United States*, 222 U.S. 139... 27
Grunewald v. *United States*, 353 U.S. 391... 18
Hagner v. *United States*, 285 U.S. 427... 23
Hammerschmedt v. *United States*, 265 U.S. 182... 18, 19, 21
Hills v. *United States*, 97 F. 2d 710... 28
Huff v. *United States*, 192 F. 2d 911, certiorari denied, 342 U.S. 946... 17
Jencks v. *United States*, 353 U.S. 657... 39

Cases—Continued

	Page
Kay v. *United States*, 303 U.S. 1	29, 30, 31, 32
Leedom v. *International Union of Mine, Mill and Smelter Workers*, 352 U.S. 145	19, 20, 21, 50
Lutwak v. *United States*, 344 U.S. 604	14, 21, 22
Madden v. *United States*, 80 F. 2d 672	28
Mattox v. *United States*, 156 U.S. 237	50
May v. *United States*, 175 F. 2d 994, certiorari denied, 338 U.S. 830	23
National Labor Relations Board v. *Dant*, 344 U.S. 375	19
National Labor Relations Board v. *Highland Park Co.*, 341 U.S. 322	19
Ogden v. *United States*, 303 F. 2d 724	28
Pittsburgh Plate Glass Co. v. *United States*, 360 U.S. 395, affirming 260 F. 2d 397	10, 39, 40, 42, 43
South Carolina v. *Katzenbach*, No. 22 Orig., decided March 7, 1966	34
United States v. *Barra*, 149 F. 2d 489	28
United States v. *Bramblett*, 348 U.S. 503	24
United States v. *Brown*, 381 U.S. 437	10, 33, 34, 35
United States v. *Butler*, 297 U.S. 1	30
United States v. *Debrow*, 346 U.S. 374	23
United States v. *Giampa*, 290 F. 2d 83	42, 51
United States v. *Gilliland*, 312 U.S. 86	24
United States v. *Hutcheson*, 312 U.S. 219	23
United States v. *Isthmian S. S. Co.*, 359 U.S. 314	41
United States v. *Johnson*, 165 F. 2d 42, certiorari denied, 342 U.S. 946	17
United States v. *Kapp*, 302 U.S. 214	29, 30, 31, 32
United States v. *Manton*, 107 F. 2d 834, certiorari denied, 309 U.S. 664	13, 14
United States v. *Meyer*, 140 F. 2d 652	28
United States v. *Micele*, 327 F. 2d 222	51
United States v. *Orta*, 253 F. 2d 312, certiorari denied, 357 U.S. 905	28
United States v. *Parker*, 244 F. 2d 943, certiorari denied, 355 U.S. 836	28
United States v. *Reina*, 242 F. 2d 302, certiorari denied *sub nom. Moccio* v. *United States*, 354 U.S. 913	17
United States v. *Remington*, 208 F. 2d 567, certiorari denied, 347 U.S. 913	27
United States v. *Rosenberg*, 245 F. 2d 870	40
United States v. *Schneider*, 45 F. Supp. 848	28

Cases—Continued

	Page
United States v. *Spangelet*, 258 F. 2d 338	51
United States v. *Williams*, 341 U.S. 58	27
United States v. *Winter*, 348 F. 2d 204, certiorari denied, 382 U.S. 955	23
Williams v. *United States*, 168 U.S. 382	22

Constitution, statutes and rules:

United States Constitution:	
First Amendment	25, 26
Fifth Amendment	25, 26, 36
Jencks Act, 18 U.S.C. 3500	40, 50
National Labor Relations Act, 49 Stat. 453, Sec. 9, as amended by the Labor-Management Relations Act of 1947, Sec. 9(h), 29 U.S.C. 159(h)	2, 3, 4, 6, 7, 8, 9, 10, 12, 18, 19, 20, 21, 24, 25, 26, 29, 32, 33, 34, 36, 47
Labor-Management Reporting and Disclosure Act of 1959, Sec. 201(d), 73 Stat. 525	3
5 U.S.C. 118(i)	34
18 U.S.C. 371	2, 3, 4, 12, 13, 17, 22, 23
18 U.S.C. 1001	2, 12, 23, 24
28 U.S.C. 458	34
Federal Rules of Criminal Procedure:	
Rule 6(e)	39, 41
Rule 7(c)	22
Rule 16(a)	41
Rule 31(c)	24

Congressional materials:

S. Rep. No. 981, 85th Cong., 1st Sess.	40
103 Cong. Rec. 15933	40

Miscellaneous:

Goldstein, *Conspiracy To Defraud the United States*, 68 Yale L.J. 405 (1959)	14

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 502

RAYMOND DENNIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 384–403) is reported at 346 F. 2d 10. The prior opinion of that court, reversing petitioners' convictions after their first trial (Pet. App. A2), is reported at 302 F. 2d 5. The opinion of the district court denying motions to dismiss the indictment (R. 8–16) is reported at 160 F. Supp. 787.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1965 (R. 404). A petition and two supplementary petitions for rehearing were denied on June 28, 1965 (R. 405–425). Mr. Justice White ex-

tended the time for filing a petition for a writ of certiorari to August 27, 1965, and the petition was filed on August 26, 1965. It was granted in part on November 15, 1965 (R. 427; 382 U.S. 915).

STATUTES INVOLVED

1. 18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

2. 18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

3. Section 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations

Act of 1947 (formerly 29 U.S.C. (1958 ed.) 159(h)), which was repealed by Section 201(d) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525, provided:

> No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit, executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of [sections 286, 287, 1001, 1022 and 1023 of Title 18] shall be applicable in respect to such affidavits.

QUESTIONS PRESENTED

1. Whether the indictment properly charged a conspiracy to defraud the United States under 18 U.S.C. 371.

2. Whether Section 9(h) of the Taft-Hartley Act (formerly 29 U.S.C. 159(h)) is constitutional.

3. Whether the trial court erred in denying peti-

tioners' motions for production, to the defense or to the Court, of grand jury testimony of prosecution witnesses.

STATEMENT

Four of the petitioners are or have been officers of the International Union of Mine, Mill and Smelter Workers ("Mine-Mill"); the other two are or have been members of Mine-Mill. They and eight others were charged in a one-count indictment returned on November 16, 1956, in the United States District Court for the District of Colorado, with conspiring to defraud the United States and an agency thereof—*i.e.*, the National Labor Relations Board ("NLRB")—in violation of 18 U.S.C. 371 by obtaining the services of the NLRB for Mine-Mill "without lawfully and in good faith qualifying" (R. 2) the union under Section 9(h) of the Labor Management Relations Act of 1947. The indictment alleged that petitioners, who were members of the Communist Party, had agreed together and with other conspirators to file with the NLRB false non-Communist affidavits and falsely to pretend to sever their associations with the Communist Party in order to obtain the benefits of NLRB services and facilities. It was also alleged that the conspirators had agreed to use the Board's services with knowledge of the falsity of their affidavits and of Mine-Mill's failure to comply with Section 9(h) (R. 1–6).

Petitioners' motion to dismiss the indictment for failure to state an offense under 18 U.S.C. 371 was denied by the trial court (R. 8–16). After a trial by jury, petitioners and three co-defendants were

convicted.[1] On appeal, petitioners' convictions were reversed because prejudicial hearsay had been admitted in evidence,[2] but the court of appeals affirmed the district court's denial of petitioners' motion to dismiss (302 F. 2d 5; Pet. App. 21a–36a). Petitioners were then retried and convicted.[3] Each was sentenced to three years' imprisonment and fined $2,000 (R. 22–28). The court of appeals affirmed all the convictions (R. 385–403).

The evidence showed that petitioners were members of the Communist Party and officers or staff members of Mine-Mill during the relevant period (R. 40–46, 49–51, 55–58, 60–63, 81–83, 92–101, 118–122, 129–130, 140–157, 184–188, 191–196, 204–207, 210–214, 222–228, 231–237, 245, 275–279),[4] that Mine-Mill and the Communist Party opposed compliance with Section 9(h) prior to 1949 (R. 123–126; Govt. Ex. 2, 3(a)); that the Party and the union changed their

[1] Three of the fourteen defendants named in the indictment had pleaded *nolo contendere* and were given suspended sentences. Two other defendants were acquitted at the first trial.

[2] The court instructed, however, that the indictment be dismissed against two of the defendants who had been found guilty (Pet. App. 36a).

[3] One co-defendant was acquitted by the jury at this second trial (R. 389).

[4] Raymond Dennis was an International Representative and later a board member; Irving Dichter was also an International Representative and later a board member; Harold Sanderson was a member of the office staff and served most of the relevant period as Assistant to the President; Albert Skinner was an International Representative and Director of the Political Action Committee; Maurice Travis was Secretary-Treasurer of the union until 1955; and Charles Wilson was an International Representative, then a board member, and later Vice-President for the Eastern States.

212-182—66——2

policies of opposition in that year (R. 129–132, 215–219; Govt. Ex. 6); and that, after this change of position, the petitioners, who were officers of Mine-Mill, submitted resignations to the Party and signed non-Communist affidavits in order to obtain for Mine-Mill the services of the NLRB (R. 216, 248, 278–281; Govt. Ex. 11, 13, 14, 15).

The evidence relating to the background of the conspiracy showed that, prior to June 1949, the Communist Party, acting through petitioners and others, played a dominant role in the affairs of Mine-Mill (*e.g.*, Travis, Dichter and Dennis, R. 48, 52–57; Wilson, R. 211, 237). For example, when Mine-Mill board member Kenneth Eckert, led a drive for compliance with Section 9(h) in 1948, petitioners Travis, Dennis, and Dichter, under the guidance of a Party leader who was not a member of Mine-Mill, were instrumental in having Eckert removed from union office (R. 40–47). At around the same time, all six petitioners attended Communist Party meetings, often presided over by Party officials who were not in Mine-Mill, at which various union problems were considered, particularly the threat to Communist control of Mine-Mill posed by Section 9(h) (R. 48–49, 52–57, 239–241, 213—218). The fear was that, as petitioner Travis stated on a number of occasions, "it would behead the union, to sign the non-Communist affidavits under the Taft-Hartley Act" (R. 41, 56–57). The decision that Mine-Mill would not comply with Section 9(h) was "made in the Party" (R. 124), and petitioners acted in accordance with the Party's policy.

The reversal of the policy of noncompliance also

emanated from Communist Party leadership. In the Spring of 1949, petitioner Travis informed witness William Mason that "the boys in the Party are considering changing our position" on Section 9(h) (R. 130; see also Wilson, R. 215–217, 243–244, 245–249). Shortly thereafter, the union's Executive Board, with petitioners Wilson and Sanderson in attendance, voted unanimously for compliance with the Act (R. 132–137). Thereupon, a rearrangement of the relationship of the Communist Mine-Mill officials to the Party was undertaken under the guidance of Party functionaries (Wilson, R. 213–218, 245–250; Dennis, R. 282–283). Petitioner Sanderson was given the job of coordinating the activities of Communists on Mine-Mill's staff, including the collection of Party dues (R. 250–251; see also R. 139–141). All Mine-Mill officials who were Communists, except petitioner Travis, who made a public announcement of resignation (R. 142–143, 145, 280–281), sent letters of resignation from the Party to local Party offices (*e.g.*, Wilson, R. 216–217, 254; Dennis, R. 278–279). As Travis subsequently admitted, his resignation "was recognized pretty much as a subterfuge to avoid prosecution under Taft-Hartley and most people accepted the fact that he was still in the Communist Party" (R. 281).

After the union voted to comply with Section 9(h), Communist control of its affairs, through petitioners and others, continued (*e.g.*, Skinner, R. 151; Sanderson R. 288–289). The Party dictated important decisions in the union's administration, including the selection of union officers and staff members (R. 61–62, 227, 272–

274, 277–278, 282–283) and even the employment of office workers (R. 284). As petitioner Dichter stated in 1955 to witness Gardner—whom he was investigating for the Party because of Gardner's opposition to petitioner Travis' policies—Mine-Mill was "one of the last real strongholds of the Party where the Party voice to the trade union movement could be heard" (R. 305; see also Skinner, R. 150–151; Travis, R. 154–155; Wilson, 157–158, 227, 286–287).

On several occasions after filing the affidavits called for by Section 9(h), petitioners sought and obtained for Mine-Mill the services of the National Labor Relations Board (Skinner, Govt. Ex. 18, 19; Dennis, Govt. Ex 20; Wilson, Govt. Ex. 21; Dichter, Govt. Ex. 22).

SUMMARY OF ARGUMENT

I

A. Petitioners were properly charged with having conspired to defraud the United States. The fact that their conspiracy may have included an agreement to commit substantive offenses did not preclude a prosecution for the kind of conspiracy which requires proof of fraud. *Bridges* v. *United States*, 346 U.S. 209, on which petitioners rely for the contrary proposition is inapposite because in that case the Court was merely construing the Suspension of Limitations Act, which, it determined, warranted "conservative interpretation." Moreover, *Bridges* involved nothing more than a conspiracy to commit substantive offenses. The present conspiracy con-

templated other conduct in addition to the commission of the offenses.

B. Petitioners were guilty of conspiring to defraud the government because they sought, by deceitful means, to obtain for their union services for which it was disqualified under Section 9(h) of the Labor Management Relations Act of 1947. The fact that, for reasons of efficient administration, the National Labor Relations Board was not given the power by Congress to determine the truth or falsity of affidavits submitted to it under Section 9(h) did not diminish petitioners' fraud. Their course of conduct was directed at frustrating the legislative will by dishonesty.

C. In any event, petitioners were not prejudiced by any flaw in the pleading. The indictment charged them with the crime of conspiracy—which is a single offense even if the agreement comprehends many illegal objectives—and it informed them of the details of the alleged offense. They were given due notice, and the body of the indictment certainly defined the offense with sufficient particularity to prevent any danger of double jeopardy. At best, petitioners' contention is that they were convicted of a conspiracy which is a lesser-included offense within the conspiracy to defraud with which they were charged. The variance between the allegation of a greater offense and the proof of a lesser included one is not prejudicial.

II

A. Petitioners could have challenged the constitutionality of Section 9(h) by refusing to file any affi-

davits with the National Labor Relations Board and then bringing an action to compel the Board to provide its services to Mine-Mill. Their constitutional claim did not, however, afford them a license to file false affidavits, and they may not defend against a prosecution based on the affidavits' falsity by challenging the constitutionality of the filing requirement. To permit such a belated challenge would be to place a premium on deception by inviting a first attempt falsely to evade the statute's operation.

B. In any event, Section 9(h) was not unconstitutional. It did not directly impose a criminal penalty on Communists holding union office, as did its successor, which was held unconstitutional in *United States* v. *Brown*, 381 U.S. 437. Nor was it an overboard infringement on a constitutionally protected liberty, as was the passport restriction declared unconstitutional in *Aptheker* v. *Secretary of State*, 378 U.S. 500.

III

A. Petitioners were not entitled, as of right, to examine the grand jury testimony of government witnesses. This Court so held in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, and there is no occasion to reconsider that decision in this case.

B. While it is generally the "safer" course for district judges to make an *in camera* inspection of a witness' grand jury testimony on demand by the defense, we do not believe an inflexible rule requiring such examination is desirable. Such a procedure imposes a serious burden on the court, and it should not be required unless the defense comes forward with

something more than a bare demand. In this case, we submit, although petitioners have made a substantial showing here, they failed to offer any justification to the district court.

C. The trial judge in this case expressed a readiness to examine grand jury minutes if a particularized showing was made. An analysis of the record demonstrates that although petitioners had other prior statements of the witnesses they made no effort to show the district judge why *in camera* examination was warranted. They relied instead on general assertions that inconsistencies were likely to be found. In these circumstances, the district judge acted within his discretion in denying the requests.

D. Should this Court disagree with the conclusion of the court of appeals regarding the district judge's refusal to examine the minutes *in camera*, it does not follow that the convictions must be reversed. Since petitioners have made a substantially greater showing here than in the district court, it would be more appropriate for this Court to remand the case to the trial judge for his examination of the grand jury minutes. Only if he certifies that there were material inconsistencies otherwise unknown to the defense should the convictions be reversed.

ARGUMENT

I

THE INDICTMENT PROPERLY CHARGED A CONSPIRACY TO DEFRAUD THE UNITED STATES

A. ALTHOUGH IT WAS PART OF PETITIONERS' CONSPIRACY TO COMMIT STATUTORY OFFENSES, THEY COULD PROPERLY BE CHARGED WITH CONSPIRING TO DEFRAUD THE UNITED STATES.

Petitioners were convicted under an indictment which charged them with having conspired "to defraud the United States and an agency thereof" (R. 2) by fraudulently effectuating compliance with Section 9(h) on behalf of Mine-Mill. They contend that since the gist of the alleged fraud was the filing, by the union's officers, of false non-Communist affidavits, and since Section 9(h) explicitly makes 18 U.S.C. 1001 (the false statements statute) applicable to the affidavits filed pursuant to the statute, a conspiracy centering on the filing of false affidavits can only be charged under the portion of 18 U.S.C. 371 which relates to conspiracies "to commit any offense against the United States" and not under the other portion of the conspiracy statute—making it a crime to conspire "to defraud the United States"—which was invoked in this case (Pet. Br. 11–17). This argument misapprehends the scope of the conspiracy statute and reads into it a limitation which is not warranted by either its purpose or its language.

The conspiracy statute—18 U.S.C. 371—subjects to criminal liability two kinds of conspiracies: (1) conspiracies "to commit any offense against the United

States" and (2) conspiracies "to defraud the United States, or any agency thereof in any manner or for any purpose" (p. 2, *supra*). Petitioners contend that the conspiracy alleged in the indictment and proved by the evidence could not be of the second variety because the acts done by the conspirators constituted an "offense against the United States" and the conspiracy could therefore have been charged under the first portion of 18 U.S.C. 371. This contention supposes, however, that the two provisions in 18 U.S.C. 371 are mutually exclusive—*i.e.*, that conduct which could be charged under the "offense" portion of the conspiracy statute may not be charged under the "fraud" portion even if it would otherwise qualify under the latter provision. The statute has consistently been applied contrary to petitioners' suggested interpretation, and nothing in its language justifies petitioners' restricted construction.

In *Glasser* v. *United States*, 315 U.S. 60, which involved a conviction for conspiracy to defraud the United States of the honest services of Assistant United States Attorneys who had demanded and obtained bribes, this Court, rejecting the contention that the indictment was defective because it charged "a conspiracy to commit a substantive offense requiring concerted action, namely, bribery," quoted with approval from *United States* v. *Manton*, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664:

> The indictment does not charge as a substantive offense the giving or receiving of bribes; nor does it charge a conspiracy to give or accept bribes. It charges a conspiracy

> to * * * defraud the United States, the scheme of resorting to bribery being averred only to be a way of consummating the conspiracy and which, like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense.

See, also, *Lutwak* v. *United States*, 344 U.S. 604, 610–613.[5]

We submit that the conspiracy statute, as consistently construed heretofore, authorizes criminal prosecution, under the "fraud" provision, of a course of conduct which amounts to a conspiracy to defraud the United States even if, without proof of fraud, the defendants might also be charged under the "offense" provision. Surely the fact that the prosecutor has chosen to proceed under the portion of the statute which requires more rigorous proof—*i.e.*, proof that actual fraud was intended—should not call for dismissal of the indictment. In the present case, as in *Manton, Glasser* and *Lutwak*, the substantive offenses which were committed were merely "a way of consummating the conspiracy," the overriding objective of which was fraudulently to obtain compliance status and the accompanying benefits of such status for Mine-Mill.

At the heart of petitioners' contention is a misunderstanding of the charge made in the indictment. The conspiracy alleged did not have as its sole object the filing of false affidavits, nor was it successfully terminated when one or more affidavits were filed. As

[5] See generally Goldstein, *Conspiracy To Defraud the United States*, 68 Yale L.J. 405, 436–441 (1959), and particularly the authorities cited in notes 108–113.

the district court observed (R. 9), the indictment alleged that the conspiracy had three parts: (1) the filing of the false affidavits, (2) the fraudulent inducement of the NLRB to issue certificates of compliance, and (3) the use of the fraudulently obtained services and facilities of the Board. While it is true that the first of these objectives amounted to an offense against the United States, the entire course of conduct of which it was a part was more than that. It was precisely what the indictment alleged it to be—a conspiracy "to defraud the United States and an agency thereof" (R. 2).

In arguing the contrary, petitioners rely heavily on *Bridges* v. *United States*, 346 U.S. 209. *Bridges* concerned the question whether an indictment alleging a conspiracy to defraud the United States by making a false statement under oath to a naturalization official was excepted from the operation of the statute of limitations by the Wartime Suspension of Limitations Act. The Act suspended the limitations period "applicable to any offense * * * involving fraud or attempted fraud against the United States or any agency thereof." The Court, noting that the legislative history of the Suspension Act "emphasizes the propriety of its conservative interpretation" (346 U.S. at 216), held that it did not suspend the running of the limitations period with regard to the offense with which the petitioner was there charged. The Court said that notwithstanding the indictment's allegation of fraud against the United States, the charge and the proof supporting it "rely solely on the fact of a conspiracy to commit the substantive offenses

* * * as charged in Counts II and III." 346 U.S. at 223-224.

The *Bridges* decision is inapplicable here for at least two reasons: *First*, the issue before the Court in that case was not, as it is in this case, whether the count of the indictment which charged the defendant with defrauding the United States stated an offense. If the Court had believed that the indictment contained that flaw, it would never have reached the question whether the Suspension of Limitations Act applied to it; the conspiracy count would have been dismissed for failure to charge an offense. The only question in *Bridges* was whether the conspiracy count of the indictment was saved from the operation of the usual statute of limitations by the clause of the Suspension Act which suspended the period for offenses "involving fraud or attempted fraud against the United States." In light of the "conservative interpretation" which the Court deemed appropriate with respect to that Act, it concluded that the conspiracy count did not allege an offense "involving fraud" *within the meaning of the Suspension Act*. Nothing in the Court's opinion lends any support to the notion that the indictment failed to charge the offense of defrauding the United States *within the meaning of the conspiracy statute*. Substantially different considerations govern the decision of these discrete issues.

Second, the relevant count of the indictment in *Bridges* in fact alleged, as the Court observed (346 U.S. at 223–224), no more than a conspiracy to commit the substantive offenses charged in the second and

third counts of the indictment—*i.e.*, making a false statement and obtaining a Certificate of Naturalization by fraud. See Transcript of Record, No. 548, O.T., 1952, pp. 3–8. The indictment in this case alleges more than a conspiracy to file false affidavits. It charges that, with knowledge of the affidavits' falsity, petitioners agreed fraudulently to induce the NLRB to issue a certificate of compliance and thereafter to take advantage of this course of conduct by using the NLRB's facilities. These parts of the conspiracy do not, in and of themselves, constitute statutory offenses, but as we demonstrate below, they amount to a fraud on the United States within the meaning of 18 U.S.C. 371. Hence it cannot be said of this indictment, as it was said of the indictment in *Bridges*, that it "merely cloaks" (346 U.S. at 224) the charge that the defendants conspired to commit a defined statutory offense. This indictment plainly alleged more. As the district court properly observed in rejecting petitioners' claims (R. 14): "The use of allegedly false non-Communist affidavits was only an incident of the conspiracy."*

*There is no substance to petitioners' claim that they were charged with conspiracy to defraud rather than with a conspiracy to commit substantive offenses merely in order to avoid the operation of the statute of limitations (Pet. Br. 15–16). Even if the indictment had been framed in terms of a conspiracy to file false affidavits, the whole sequence of offenses committed pursuant to that conspiracy, including those antedating the limitations period, would have been admissible. See, *e.g.*, *Brown* v. *Elliott*, 225 U.S. 392, 400–401; *United States* v. *Reina*, 242 F. 2d 302 (C.A. 2), certiorari denied, *sub. nom. Moccio* v. *United States*, 354 U.S. 913; *United States* v. *Johnson*, 165 F. 2d 42, 45 (C.A. 3), certiorari denied, 332 U.S. 852; *Huff* v. *United States*, 192 F. 2d 911, 914–915 (C.A. 5), certio-

B. PETITIONERS' CONSPIRACY INVOLVED FRAUD BECAUSE THEY AGREED TO MAKE MATERIAL MISREPRESENTATIONS AND THEREBY OBTAIN SERVICES TO WHICH THEY WERE NOT ENTITLED

This Court defined the offense of conspiracy to defraud in *Hammerschmidt* v. *United States*, 265 U.S. 182, 188, as follows:

> To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention. * * *

The acts alleged to have been committed by petitioners in this case fall squarely within the above definition. The "governmental intention," in furtherance of which Section 9(h) prescribed the filing of non-Communist affidavits, was to discourage unions from electing members of the Communist Party to serve as officers. This Court has recognized that it was Congress' intention to " 'wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstitutional

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rari denied, 342 U.S. 946; *Culp* v. *United States*, 131 F. 2d 93, 100–101 (C.A. 8). Cf. *Grunewald* v. *United States*, 353 U.S. 391, 396–397. The indictment here was framed in terms of the "fraud" section simply because the conspiracy involved more than the mere filing of false affidavits.

overthrow of our Government'" (*National Labor Relations Board* v. *Highland Park Co.*, 341 U.S. 322, 325) and "to stop the use of the Labor Board by union leaders unwilling to be limited in government by the processes of reason" (*National Labor Relations Board* v. *Dant*, 344 U.S. 375, 385). If the officers of a union had conspired to conceal from the NLRB the existence of an officership in the union occupied by a member of the Communist Party so as to obviate the need of his filing an affidavit (and the remaining officers, being non-Communists, had filed the affidavits required by Section 9(h)), there could be no doubt that they would have conspired to "interfere with or obstruct one of [the government's] lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest" within the meaning of the *Hammerschmidt* decision, *supra*. Indeed, petitioners concede that if they had filed *forged* affidavits, they could unquestionably have been prosecuted for conspiring to defraud the United States (Pet. Br. 18). We submit that when, as here, officers of a union embark on a program of filing false affidavits with the NLRB so as to obtain for the union benefits which would have been unavailable if the filed declarations contained the truth, they have "defeated" the "legitimate official action and purpose * * * by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention." *Hammerschmidt* v. *United States*, 265 U.S. 182, 188.

Petitioners' argument that the Labor Board was not defrauded because it had no power, under *Leedom*

v. *International Union of Mine, Mill & Smelter Workers*, 352 U.S. 145, to look behind the affidavits is based upon an erroneous fragmentized view of the over-all scheme alleged in the indictment and on a misapprehension regarding the purpose of the statute. As we have shown (pp. 14–16, *supra*), the indictment alleged that petitioners had conspired not merely to file false affidavits but to use those affidavits to obtain benefits to which the union was not entitled. Whether or not the NLRB had the power to consider the truth of the affidavits does not bear on the fraudulent character of the entire scheme. The fact is that by using dishonest means—by filing affidavits known to be false—petitioners sought to obtain services to which their union was not entitled. Indeed, in this regard, the NLRB's incapacity to consider the truth of the affidavits renders the fraud even more egregious since it means that petitioners knew that their false statements under oath could not be challenged, and that the bare act of subscribing to and filing a false statement qualified the union for benefits.

Petitioners' claim that the statutory policy of Section 9(h) was "to grant compliance to a union whose officers denied Communist ties, whether those denials were true or false" (Pet. Br. 18–19) obviously distorts the legislative intention. This Court's decision in *Leedom* v. *International Union of Mine, Mill & Smelter Workers*, 352 U.S. 145, rested on no such premise. In that case the Court, looking to the legislative history of Section 9(h), determined that Congress consciously chose not to give the NLRB the power to pass on the truth of the filed affidavits

because "representation proceedings might be indefinitely delayed if the Board was required to investigate the character of all the local and national officers * * *." 352 U.S. at 149, quoting from 2 Leg. Hist., Labor Management Relations Act, 1947, p. 1542. On the basis of this statement, corroborated by Senator Taft's explanation to the Senate (352 U.S. at 150), and by the unfairness of "impos[ing] on a union the drastic penalty of decompliance 'because its officer had deceived the union as well as the Board by filing a false affidavit'" (352 U.S. at 151), this Court held that the Board had not been empowered to examine the truth of affidavits filed under Section 9(h). The fact that it was deemed inconvenient and administratively unsound to impose this burden on the NLRB does not mean that Congress wished to confer the Board's services on unions whose officers filed affidavits, even if the affidavits were false. It was obviously Congress' desire to deny NLRB facilities to such unions, but that could not be accomplished without imposing the undesirable administrative burden on the Board. Consequently, Congress chose the practicable means of enforcing Section 9(h), but it was surely presupposing that those subject to the statute would file truthful statements, not false ones. By conspiring to file untruthful affidavits and to capitalize on the Board's incapacity to look behind them, petitioners were obstructing governmental functions "by deceit, craft or trickery" within the meaning of *Hammerschmidt, supra.*

In *Lutwak* v. *United States,* 344 U.S. 604, 610–613,

this Court sustained a conviction under the "fraud" portion of 18 U.S.C. 371 and held that whether or not the marriages with foreign spouses which were at the heart of the scheme to defraud were valid was immaterial. The Court noted that in passing the War Brides Act, which directed that "alien spouses" of citizen war veterans be admitted into the country, Congress intended to allow in only *bona fide* wives of war veterans and not "to provide aliens with an easy means of circumventing the quota system by false marriages." 344 U.S. at 611. It was not then clear whether the immigration authorities could have refused to allow entry to a legal spouse merely because her intention was to dissolve the marriage after arriving in the United States. Nonetheless, the fact that deception had been practiced to defeat the purpose of an Act of Congress was held sufficient to render the conspiracy one "to defraud the United States" within the meaning of 18 U.S.C. 371.

C. IF THERE WAS ERROR IN CHARGING PETITIONERS, IT WAS NONPREJUDICIAL

In any event, since the facts alleged in the indictment admittedly stated an offense against the United States, any possible error in its characterization as a conspiracy to defraud rather than a conspiracy to commit an offense would not warrant dismissal of the indictment. The situation is no different from that in which the wrong statute is cited in the indictment—an error which, under the Rules, does not warrant dismissal. See Rule 7(c), F.R. Crim. P.; *Wil-*

liams v. *United States*, 168 U.S. 382, 389; *United States* v. *Hutchinson*, 312 U.S. 219, 229. There was no prejudice here.

The fallacy in petitioners' argument is the assumption that a conspiracy to defraud under 18 U.S.C. 371 is a separate crime from conspiracy to commit an offense. The statute may describe two classes of conspiracies, but it defines only one crime. The conspiracy itself, rather than its objectives, constitutes the crime. *Frohwerk* v. *United States*, 249 U.S. 204, 210; *Braverman* v. *United States*, 317 U.S. 49, 54; *May* v. *United States*, 175 F. 2d 994 (C.A.D.C.), certiorari denied, 338 U.S. 830. All that is required is that the objective of the conspiracy be sufficiently identified to apprise the accused of the charge he must meet. That was clearly done here. Moreover, since there is only one crime of conspiracy, a conviction or acquittal under the instant indictment would protect petitioners from another conspiracy prosecution based on the same facts, whether it is characterized as a conspiracy to commit a crime or to defraud the United States. Thus the indictment met the basic tests for determining validity. It informed petitioners of the charges against them and protected them from double jeopardy. See *United States* v. *Debrow*, 346 U.S. 374, 376; *Hagner* v. *United States*, 285 U.S. 427, 431.

These principles are particularly appropriate here because the offense against the United States which petitioners admit the conspiracy embraced—the filing of false statements in violation of 18 U.S.C. 1001—is itself a species of fraud. The false statement stat-

ute, 18 U.S.C. 1001, was designed to protect the authorized functions of governmental departments and agencies from perversion by means of false and fraudulent statements even if such statements do not result in pecuniary loss. *United States* v. *Gilliland*, 312 U.S. 86, 93; *United States* v. *Bramblett*, 348 U.S. 503.

Petitioners contend that the charge made in the body of indictment was that they conspired to violate 18 U.S.C. 1001, but that the indictment also charged them with fraud—which is not a necessary element for criminal liability under the false statements statute. In this regard, their contention is essentially that conspiracy to violate 18 U.S.C. 1001—which they believe to be the only offense charged in the body of the indictment and proved by the evidence—is a lesser offense included within the greater allegation of conspiracy to defraud the government by means of false non-Communist affidavits. Even if the contention is valid—and for the reasons stated above we believe it is not—petitioners are no more prejudiced than any defendant who is charged with a greater offense and convicted of a lesser included one. Such a conviction is authorized by Rule 31(c), F.R. Crim. P., and has never been seriously questioned.

II

PETITIONERS' CONVICTIONS ARE NOT INVALID ON CONSTITUTIONAL GROUNDS

Petitioners also attack their convictions on constitutional grounds, asserting that Section 9(h) of the National Labor Relations Act is either a bill of

attainder, an infringement upon their First Amendment rights of speech and association, or an overbroad classification which exceeds permissible limits under the Fifth Amendment (Pet. Br. 19–35). The constitutional challenge is unsound for two reasons: *First,* the constitutionality of Section 9(h) has no bearings upon the validity of petitioners' convictions. Even if Congress were not constitutionally permitted to condition the availability of NLRB services on the filing of non-Communist affidavits by union officers, as it did in Section 9(h), officers of affected unions were not, by reason of the statute's enactment, licensed to file *false* affidavits (or conspire to do so) in order to avoid the effect which Section 9(h) had (and was intended to have) on unions whose officers were members of the Communist Party. The appropriate method for challenging the constitutionality of Section 9(h) was that used by the plaintiffs in *American Communications Association* v. *Douds,* 339 U.S. 382, where unions which had refused to comply with the statute instituted proceedings to compel the NLRB to offer its services equally to them. *Second,* Section 9(h) was authoritatively held constitutional in the *Douds* case, and with respect to the constitutional claim which is relevant here the decision was by a vote of five-to-one (three Justices not participating). Petitioners suggest no compelling reason for overruling that decision at the present time.

A. PETITIONERS' CONVICTIONS FOR CONSPIRING TO DEFRAUD THE GOVERNMENT ARE VALID IRRESPECTIVE OF THE CONSTITUTIONALITY OF SECTION 9(H)

The statutory provision which petitioners subject to constitutional attack directed the National Labor Relations Board not to conduct investigations or issue complaints on behalf of any union unless its officers had filed affidavits with the Board stating that they were not members of or affiliated with the Communist Party.[7] If, as petitioners contend, this statute was constitutionally invalid because it constituted a bill of attainder or infringed the guarantees of the First or Fifth Amendment rights, they were entitled to file no affidavits whatever. Their constitutional claim could then have been heard and determined in a suit instituted by the union to obtain the services of the NLRB.

Petitioners were not entitled, however, to use their constitutional challenge as an excuse for filing false affidavits. The posture of their claim in this case is, in this regard, analogous to a claim which might be made by a witness who is prosecuted for giving a false answer to a question to which he could have invoked the constitutional privilege against self-incrimination. It is well settled "that the immunity afforded by the constitutional guarantee [against compulsory self-incrimination] relates to the past and does not endow the person who testifies with a license to commit

[7] This case involves only the "membership" requirement of Section 9(h) and not the "belief" provision. Petitioners were charged with having conspired to file statements which falsely denied membership and affiliation (R. 3). There was no allegation or proof regarding the "belief" portion of the affidavits.

perjury." *Glickstein* v. *United States*, 222 U.S. 139, 142. Whereas the witness may have been constitutionally entitled to refuse to answer and to assert the constitutional privilege in the event contempt proceedings were brought against him, that privilege is not a cognizable defense to a perjury prosecution if he chooses to answer falsely.

The same principle has been applied in other situations in which the options open to the party being compelled to answer are much more limited than the options which petitioners had here. In *United States* v. *Williams*, 341 U.S. 58, 66–69, for example, this Court held that a witness who gives false testimony at a criminal trial on an indictment which is determined on appeal to state no federal offense may be prosecuted for perjury. Obviously the witness in such a case has no truly effective means of testing the court's power to proceed before giving his testimony. If he refuses to testify on the ground that no federal offense is stated in the indictment, he assumes the risk of a contempt sanction, and the trial will likely be over before the issue is authoritatively determined. Petitioners, on the other hand, could have asserted their constitutional claim without filing any affidavits. They are no more entitled to invoke the constitutional contention as a defense to the charge of defrauding the government than could the defendant in the perjury prosecution involved in *Williams*. See, also, *United States* v. *Remington*, 208 F. 2d. 567 (C.A. 2), certiorari denied, 347 U.S. 913.

Even more striking in this regard are the decisions which hold that a prospective defendant who is called

before a grand jury and is not informed of his privilege against self-incrimination may not assert this flaw in the proceedings as a defense to a perjury prosecution for having testified falsely before the grand jury. See *United States* v. *Orta*, 253 F. 2d 312 (C.A. 5), certiorari denied, 357 U.S. 905; *United States* v. *Parker*, 244 F. 2d 943 (C.A. 7), certiorari denied, 355 U.S. 836; cf. *United States* v. *Winter*, 348 F. 2d 204, 208–210 (C.A. 2), certiorari denied, 382 U.S. 955. Although a witness in that position may be unaware of his constitutional privilege not to answer the grand jury's inquiries, it has consistently been held that this circumstance gives him no license to provide false testimony. Where, as here, the person who is asked to file a statement under oath knows that he may make his constitutional challenge without giving any statement whatever, it follows *a fortiori* that his constitutional claim provides no excuse for fraudulent representations.

This rule, which has been consistently followed in a variety of circumstances,[8] is a sound and practical one. It rests on the principle that challenges to the constitutionality of a statute or the lawfulness of a proceeding should be made directly and not by artful

[8] See *Ogden* v. *United States*, 303 F. 2d 724, 731 (C.A. 9); *United States* v. *Barra*, 149 F. 2d 489, 490 (C.A. 2); *United States* v. *Meyer*, 140 F. 2d 652 (C.A. 2); *Boehm* v. *United States*, 123 F. 2d 791 (C.A. 8), certiorari denied, 315 U.S. 800; *Hills* v. *United States*, 97 F. 2d 710, 713 (C.A. 9); *Madden* v. *United States*, 80 F. 2d 672, 674 (C.A. 1); *United States* v. *Schneider*, 45 F. Supp. 848 (E.D. Wis.); cf. *Carter* v. *Texas*, 305 U.S. 557, dismissing appeal from 135 Tex. Crim. 457, 116 S.W. 2d 371.

means which conceal the existence of a constitutional claim behind a false facade. Petitioners in this case filed affidavits which appeared regular on their face; they gave no hint of any underlying constitutional challenge. It was only after the falseness of the affidavits was discovered and prosecution was instituted that petitioners raised their constitutional objection to the statutory requirement that they file affidavits of this sort. A witness who chooses to bypass his constitutional privilege not to answer and responds falsely in the hope that his perjury will not be discovered is not permitted thereafter to retreat to his constitutional guarantee if his gamble fails. Petitioners similarly chose to file false affidavits rather than to assert their constitutional claims by not filing at all. They, like the perjured witness, are not entitled to resurrect their constitutional defenses when their deception is discovered.* To permit them to do so would be to encourage those who have constitutional challenges of this kind to attempt first to defraud or deceive government agencies, possibly at the expense of other innocent parties.

This principle underlies the decisions of this Court in *United States* v. *Kapp*, 302 U.S. 214, and in *Kay* v. *United States*, 303 U.S. 1. In the *Kapp* case the

*The circumstances of this case render it highly probable that petitioners consciously chose to file false affidavits in the hope that they would not be prosecuted rather than to contest the constitutionality of Section 9(h). This Court's decision in *American Communications Association* v. *Douds*, 339 U.S. 382, was rendered in May 1950. Hence petitioners knew as of that time that, barring unforeseen circumstances, their constitutional claims would be summarily rejected by the lower courts.

appellees had been indicted for conspiring to violate the false statements statute in reports made to the Secretary of Agriculture under the Agricultural Adjustment Act of 1933. The district court dismissed the indictment because the Agricultural Adjustment Act had been held unconstitutional by this Court in *United States* v. *Butler*, 297 U.S. 1. Reversing the district court's judgment, this Court said (302 U.S. at 217–218):

> * * * Appellees were not indicted for a conspiracy to violate the Agricultural Adjustment Act but for a conspiracy to violate the statute protecting the United States against frauds. It is cheating the Government at which the statute aims and Congress was entitled to protect the Government against those who would swindle it regardless of questions of constitutional authority as to the operations that the Government is conducting. Such questions cannot be raised by those who make false claims against the Government. * * *

Shortly thereafter, in *Kay* v. *United States*, 303 U.S. 1, the Court unanimously reaffirmed the holding in *Kapp* in reviewing a conviction under a statutory provision imposing criminal liability for false statements submitted to the Home Owners' Loan Corporation. The petitioner in that case, like petitioners here, sought to challenge the constitutionality of the Home Owners' Loan Act of 1933 on review of his conviction. This Court rejected the contention (303 U.S. at 6–7):

> * * * There is no occasion to consider this broad question as petitioner is not entitled to

> raise it. When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction.
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> * * * While the instant case is not one of conspiracy to obtain money from the United States, but one of false statements designed to mislead those acting under authority of the Government, the principle involved is the same [as in the *Kapp* case]. Apart from any question of the validity of the other provisions of the Home Owners' Loan Act, Congress was entitled to secure protection against false and misleading representations while the Act was being administered, and the separability provision of the Act (§ 9) is clearly applicable. * * *

The *Kapp* and *Kay* cases do not turn, as petitioners suggest (Pet. Reply to Government's Opposition, p. 4; Pet. Brief 20, n. 15), on the fact that the defendants in those cases had been attempting fraudulently to obtain benefits or "bounties" under the very statute whose constitutionality they were challenging. Although that circumstance might be a distinguishing feature on the facts of *Kapp* and *Kay*, it was neither adverted to in the opinions of Mr. Chief Justice Hughes in those cases nor has it been deemed an essential element of those decisions by the courts which have subsequently applied the *Kapp* and *Kay* principle in other circumstances. The limited reading which petitioners would give these cases would

surely make them inapplicable to situations such as that of the perjured witness, who obviously is seeking no "bounty." The principle underlying *Kapp* and *Kay* is not, we submit, the well established rule that "[t]he Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits." Brandeis, J., concurring, in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348, quoted in *Fahey* v. *Mallonee*, 332 U.S. 245, 255.[10] It is, rather, that no person, whether or not he is seeking the benefits of a statute, may test its constitutionality by first attempting to evade it by means of false representations and then raising the constitutional claim when his evasion is discovered. That principle applies to this case with as much force as it did to *Kapp* and *Kay;* indeed petitioners here had more of an opportunity to challenge the constitutionality of the statute directly, through the union which they controlled, than did the defendants in *Kapp* and *Kay*. Hence any alleged constitutional infirmity in the statute is unavailable as a basis for reversing their convictions for conspiring to defraud the government.[11]

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[10] We note that in applying this rule in the *Fahey* case, the Court did not rely upon or cite either *Kapp* or *Kay*.

[11] The Court's order granting certiorari did not, as petitioners contend (Pet. Br. 20, n. 15), foreclose this argument. The Court's order limited the writ of certiorari to the first three questions presented in the petition for a writ of certiorari in the language used by the petition. If, as we contend, the constitutionality of Section 9(h) does not affect the validity of petitioners' convictions, the Court could not decide the second question presented by the petition—*i.e.*, "[w]hether * * * Section 9(h) of the Taft-Hartley Act is constitutional"—without

B. SECTION 9(H) IS NEITHER A BILL OF ATTAINDER NOR AN IMPERMISSIBLE INFRINGEMENT ON FIRST AND FIFTH AMENDMENT LIBERTIES

Petitioners' argument that the Court's decision in *American Communications Association* v. *Douds*, 339 U.S. 382, should be overruled is based principally on the recent decisions in *United States* v. *Brown*, 381 U.S. 437, and in *Aptheker* v. *Secretary of State*, 378 U.S. 500. We submit that neither decision warrants a reevaluation of *Douds*.

1. The statute which this Court invalidated as a bill of attainder in *United States* v. *Brown*, 381 U.S. 437, imposed an absolute prohibition on simultaneous membership in the Communist Party and the holding of union office. Congress had named the Communist Party "in no uncertain terms" and had directed that its members "cannot hold union office without incurring criminal liability." 381 U.S. at 450. This, the Court held, violated the constitutional rule that prohibits the legislature from "specify[ing] the people upon whom the sanction it prescribes is to be levied." 381 U.S. at 461. Section 9(h) did not impose unconditional prohibitions or sanctions of this sort. Whereas Section 504 of the Labor-Management Reporting and Disclosure Act of 1959—which was at issue in the *Brown* case—said, in effect, to members of the Communist Party, "You may not serve as union officers," Section 9(h) of the 1947 Act said, "If you serve as

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rendering an advisory opinion. Moreover, the phrasing used by a petitioner in presenting an issue to the Court patently cannot preclude a respondent from arguing that the issue is not, in fact, dispositive of the case. Even if certiorari is granted, the Court may determine that the issue is not actually presented.

union officers, your union will be unable to use the facilities of the National Labor Relations Board." The former is a prohibition; the latter was described by this Court in Douds as a "discouragement" (339 U.S. at 402).

We submit that this distinction is relevant to the question whether Section 9(h) constituted a bill of attainder. For it is doubtless true that Congress must often impose restrictions of various kinds on the basis of legislative findings which "specify the people upon whom" (381 U.S. at 461) the restriction is levied.[12] Yet not every such restriction must fall as a bill of attainder. Congress has provided in 28 U.S.C. 458, for example, that "[n]o person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court." While the statute marks out two very definite classes—*i.e.*, judicial officers and their close relatives—it does not impose criminal sanctions upon either. It disqualifies brothers and sisters of judges from holding office in their relatives' court, but that restriction can hardly be deemed the sort of "deprivation" to which the constitutional bill-of-attainder provision applies. Nor, we submit, can it be claimed that the bill-of-attainder clause is violated by 5 U.S.C. 118i, which states, "[n]o officer or employee in the executive branch of the Federal Government, or any agen-

[12] Compare, for example, the legislative findings on which Congress based the "coverage formula" of the Voting Rights Act of 1965 which this Court recently sustained in *South Carolina* v. *Katzenbach*, No. 22 Orig., decided March 7, 1966, pp. 23–25.

cy or department thereof, shall take any active part in political management or in political campaigns." Although federal employees are deprived by the statute of the right to participate in political campaigns, this regulation of their activity is not sufficiently substantial to offend the bill-of-attainder clause. In both of the above instances Congress was obviously concerned with evils which may be caused by persons other than those in the group specifically enumerated in the statute and which are not necessarily produced by all those within the group." Yet in each instance Congress has made a legislative finding which has narrowed the group to which the statutory restriction applies.

We submit that even under the *Brown* decision the nature of the "deprivation" is a material element in determining the statute's constitutionality. Where, as under Section 9(h), the statute imposes no immediate criminal sanction but merely acts as an indirect "discouragement," the effect is more regulatory than punitive, and it is not, therefore, sufficiently substantial to invalidate Congress' legislative determination regarding the scope of the evil.

2. *Aptheker* v. *Secretary of State*, 378 U.S. 500, does not support petitioners' contention that Section

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"The evils of nepotism may result from a judge's appointment of a second cousin as a clerk of the court but may not be present if a circuit judge's son is assigned to summer duty as a library assistant. Similarly, the impartiality of janitors in federal executive office buildings is not likely to be affected by their active participation in partisan politics; the evil may often be greater if employees of the judicial branch of government engage actively in political campaigns.

9(h) is invalid under the Fifth Amendment. Both *Aptheker* and this case involve a restriction on members of the Communist Party. But in *Aptheker*, it was conceded that the restriction imposed by the statute directly affected "the right to travel * * * protected by the Fifth Amendent" (378 U.S. at 505), and the principal issue was whether the restriction upon this constitutionally protected liberty amounted to "reasonable regulation" (*ibid.*). The parallel freedom involved in this case is the freedom to serve as a union officer—which has never been expressly or impliedly recognized by this or any other court as a constitutionally guaranteed "liberty."

There are, in addition, other differences between this case and *Aptheker*. As this Court noted in *Aptheker*, the statute in that case applied "whether or not the [Communist Party] member actually knows or believes that he is associated with what is deemed to be a 'Communist-action' or 'Communist-front' organization." 378 U.S. 509–510. Section 9(h) obviously applies only to knowing members of the Communist Party. In addition, the statute held invalid in *Aptheker* effectively prohibited foreign travel by Communist Party members irrespective of the purpose of the travel. 378 U.S. at 511–512. Section 9(h) is confined to particularized conduct (union officership) which presents a specific evil (the danger of political strikes). Hence Section 9(h) is "more discriminately tailored to the constitutional liberties of individuals" (378 U.S. at 514) than the passport restriction in *Aptheker*.

It is true that one of the vices of the statute held unconstitutional on its face in *Aptheker* was that it rendered "irrelevant the member's degree of activity in the organization and his commitment to its purpose" (378 U.S. at 510), and the challenged provision in this case is similar, in that respect, to the statute involved in *Aptheker*. But an important element in the *Aptheker* decision was the Court's conclusion that the end which Congress wished to achieve—*i.e.*, to restrict the freedom of Communist agents to travel abroad and act as couriers for ventures in espionage or sabotage—could have been achieved by considering membership in the Communist Party not as an absolute disqualification but "one factor to be weighed" (378 U.S. at 513) in the passport screening process—as in federal employment. There is no similar administrative process, however, for evaluating the danger which candidates for union office may present to this nation's industry and commerce. The governing statute, therefore, had to incorporate a self-executing standard if it were not to impose on the National Labor Relations Board the task of evaluating how serious a danger of political strikes was posed by any particular union officer. The Board is obviously unequipped to make that decision, and we submit that the Constitution did not require Congress to assign it any such task. Congress acted reasonably and properly in this area by making membership alone the touchstone.

III

THE DISTRICT COURT'S RULINGS ON PETITIONERS' MOTIONS REGARDING WITNESSES' GRAND JURY TESTIMONY DID NOT CONSTITUTE REVERSIBLE ERROR

Petitioners contend (Pet. Br. 36–53) that the district court committed reversible error in refusing to turn over to the defense or to make an *in camera* inspection of the grand jury testimony of four of the eight government witnesses who testified at petitioners' second trial. The court of appeals agreed that the district court had "the inescapable duty * * * to lift the lid of secrecy on grand jury proceedings in aid of the search for truth" and that its obligation was "not [to] hesitate to inspect and to disclose any inconsistencies if it is likely to aid the fair administration of criminal justice through proper cross-examination and impeachment" (R. 396). On these premises the court concluded that, although "it would have been safer to have inspected the grand jury testimony," the trial court's rulings did not amount to reversible error because "the witnesses were thoroughly and competently cross-examined on numerous other relevant judicial and extra-judicial statements without manifest inconsistency." It was, therefore, "safe to assume that the grand jury proceedings would not have disclosed anything of impeaching significance" (*ibid.*). The court of appeals' conclusion was, we believe, a reasonable one in light of the particular circumstances of this case.

A. DEFENDANTS HAVE NO ABSOLUTE RIGHT TO EXAMINE A WITNESS' GRAND JURY TESTIMONY

In *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, at the conclusion of the testimony of a key government witness, the defense requested access to that portion of his grand jury testimony which related to the subject matter of his trial testimony. The trial judge denied this request. This Court sustained the action of the trial judge and rejected the argument that statements made in grand jury proceedings were no different from other out-of-court statements and were, therefore, controlled by the principles of *Jencks* v. *United States*, 353 U.S. 657. The Court observed that Rule 6(e) of the Federal Rules of Criminal Procedure had committed the disclosure of grand jury minutes to the discretion of the trial court in accordance with the traditional policy of grand jury secrecy. It explained this policy (360 U.S. at 399–400):

> "* * * [T]he American grand jury, like that of England, 'has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor.' *Ibid.* Indeed, indictments may be returned on hearsay, or for that matter, even on the knowledge of the grand jurors themselves. *Id.*, at 362, 363. To make public any part of its proceedings would inevitably detract from its efficacy. Grand jurors would not act with that independence required of an accusatory and inquisitorial body. Moreover, not only would the participation of the jurors be curtailed, but testimony would be parsimonious if

> each witness knew that his testimony would soon be in the hands of the accused. * * *

In concluding that grand jury minutes must be made available to the defense only if the interests of justice require a disclosure in the particular circumstances, this Court held that the defense had not met its burden of showing a "particularized need" for the minutes in cross-examining the witness. The Court did not, however, decide whether the trial judge was required to make an *in camera* inspection of the witness' grand jury testimony if requested to do so in order to determine whether the minutes should be given to the defense.

There is, we submit, no reason to re-examine the *Pittsburgh Plate Glass* decision at this time (Pet. Br. 50–53). The reasons for grand jury secrecy elaborated in that opinion of the Court—than grand jurors would be deterred from participating and witnesses would be reluctant to testify freely—certainly warrant different treatment for grand jury testimony than for extrajudicial statements given by witnesses to government agents. In addition, the legislative history of the Jencks Act (18 U.S.C. 3500) demonstrates that Congress was vigorously opposed to the mechanical disclosure of grand jury minutes which would result from the overruling of *Pittsburgh Plate Glass*. The Senate Report on the bill which became 18 U.S.C. 3500 sharply criticized the decision (*United States* v. *Rosenberg*, 245 F. 2d 870 (C.A. 3)) in which such production had been ordered. See S. Rep. No. 981, 85th Cong., 1st Sess., pp. 3, 10; 103 Cong. Rec. 15933. This recent expression of legislative judg-

ment suggests that if the cloak of secrecy covering grand jury minutes is to be reexamined it should be done by an amendment to the Rules of Criminal Procedure, which would be subject to congressional approval, rather than by an overruling decision of this Court. See *United States* v. *Isthmian S. S. Co.*, 359 U.S. 314, 323. Significantly, in entering an order on February 28, 1966, amending the Rules of Criminal Procedure, this Court modified Rule 6(e) but left unchanged the discretionary power of the trial court regarding the secrecy of grand jury proceedings.[14]

In view of the general rule of secrecy which, under Rule 6(e) of the Federal Criminal Procedure, is to be breached only at the direction of the court in a judicial proceeding, it should be the rare exception when a district judge directs the delivery of a witness' grand jury testimony without having examined it *in camera*. That procedure may be appropriate if the attorney for the government affirmatively represents to the court that there is nothing in the grand jury minutes which warrants further secrecy once the witness has testified. It might also be appropriate if the witness admits on cross-examination that his testimony in open court is materially different from the testimony he gave before the grand jury. In that case, there is no need for the court to determine whether inconsistencies exist, although it remains the court's function to select the portion of the witness' grand jury testimony which relates to his testimony

[14] The amended rules now specifically provide for pretrial production of the recorded testimony of a defendant before the grand jury. Rule 16(a).

at trial. In the usual case, however, the policy that grand jury minutes are secret requires the judge to make a particularized evaluation before he delivers the transcript to the defense.

B. WHETHER TO EXAMINE GRAND JURY MINUTES "IN CAMERA" IS A DISCRETIONARY DECISION TO BE MADE BY THE TRIAL COURT ON AN EVALUATION OF ALL THE CIRCUMSTANCES

Although we agree with the court of appeals that it is the "safer" course for a district judge to examine a witness' grand jury testimony *in camera* on an appropriate request by defense counsel, we do not believe that there is an unqualified legal obligation upon him to do so.[15] As Judge Sobeloff observed in the court of appeals' consideration of the *Pittsburgh Plate Glass* case (260 F. 2d 397, 404 (C.A. 4)):

> Even inspection by the trial judge, it must be recognized, has serious drawbacks. It would cast a heavy burden on the trial judge and seriously interrupt the trial for the Judge to attempt to ferret out inconsistencies in a lengthy transcript; he may not be able readily to absorb and evaluate every nuance in an extensive transcript. A further objection is that imposing this task on the Judge as regular procedure would draw him too deeply into the partisan task of preparing the cross-examination. From time to time instances may arise in which it

[15] We recognize that the rule requested by petitioners—that the trial court is obliged to examine grand jury minutes *in camera* whenever request is made by the defense—is the rule in the Second Circuit. See *United States* v. *Giampa*, 290 F. 2d 83 (C.A. 2). It has not been followed in other circuits, however (see Pet. Br. 48, n. 50), and we believe that it casts an unwarranted burden on the district courts.

> will appear to the Judge wise and just to read the transcript to check a particular point sharply in issue, but the minute examination, during the trial of elaborate grand jury minutes should not be expected of him.
>
> After all, what we are dealing with is a problem of the fair scope of cross-examination, and the sound judicial discretion of the trial judge must be the chief guide. When the subject matter is one as delicate as grand jury testimony, no fixed rule can be formulated. The Judge should not be compelled to inspect in all cases; neither should he indiscriminately refuse, but he should exercise his judgment according to the circumstances.

Various factors should appropriately enter into a district judge's decision whether or not to examine grand jury testimony *in camera*. Among them are the nature and significance of the witness' testimony and the likelihood that grand jury testimony could be of use to the defense. With respect to the latter consideration, it is appropriate to place some burden on defense counsel to state why disclosure should be made. This does not, of course, mean, as the Court emphasized in *Pittsburgh Plate Glass*, that a preliminary showing of inconsistency between the trial and grand jury testimony is necessary. It does mean, however, that a formal blanket demand couched in general terms should normally be inadequate. The defense should have the burden of showing that a real need exists, and this requires it to use such materials as are available to explain the need to the court. Thus, if other testimony or documents at the trial or

prior statements cast doubt on the veracity of the witness, this should be called to the attention of the trial judge. When such materials are available, it is reasonable to require the defense to use them to indicate how they bear on the issue of production. In other words, a defendant represented by counsel is under a duty to make some effort to show the court that his demand for grand jury minutes is a serious one, and not merely a *pro forma* motion made in the hope that, if denied, it will be available as reversible error on appeal. We believe that in this case petitioners failed adequately to support their motions for *in camera* inspection.

C. IN THE CIRCUMSTANCES OF THIS CASE, THE JUDGE'S REFUSAL TO EXAMINE THE GRAND JURY MINUTES "*IN CAMERA*" WAS NOT ERROR

The full record regarding the trial judge's rulings on the motions to produce grand jury minutes shows that the requests were made in a generalized manner and that petitioners actually possessed a large number of extrajudicial statements by the witnesses which could have been used in cross-examination if they had demonstrated inconsistencies. The record also establishes that the trial judge advised defense counsel that if a more substantial showing of need were made, he would be prepared to read the minutes *in camera*. In this Court petitioners have set out in great detail exactly why the trial testimony of the four government witnesses involved was "suspect" and how inconsistencies in the grand jury testimony might have significantly discredited them (Pet. Br. 39–45).

The district court never had the benefit of this particularized analysis, although it seems highly probable from the district judge's statements that he would have read the grand jury testimony if such a showing had been made to him.

1. *Ralph Locke.* The government's first witness at this trial was Ralph Locke, who testified about incidents occuring prior to the formation of the conspiracy. He disclosed that in April 1948 Eckert, a board member of the union, had been discharged after urging that non-Communist affidavits be filed by the union and that he was replaced by petitioner Dichter (R. 35–48). The defense was furnished with a copy of a signed statement given by Locke to the F.B.I. on March 20, 1955 (R. 74–75). They also had his testimony before the Subversive Activities Control Board in 1957 (Tr. 67) and his first trial testimony in 1959 (R. 87).

At the conclusion of Locke's direct testimony, defense counsel sought production of all of Locke's 1956 grand jury testimony and asked, alternatively, that the Court examine the testimony *in camera.* Petitioners' counsel asserted that there was a "probability" of inconsistency and that there was a "particularized need for scrutiny" supported "by the fact that the testimony deals almost entirely with alleged declarations by one or more of the defendants; that the contents of these declarations are uncorroborated by other witnesses so far as we know * * *; that the specific wording of these declarations may be of considerable importance in determining their weight, and, furthermore, that there is inconsistency between the

testimony given on this occasion and the testimony given at the prior trial" (R. 64). Government counsel responded that the defense had not shown any particularized need "but it is a matter that is so much within the discretion of the Court that I don't think we ought to take a position on it one way or the other" (R. 64–65). The court denied the request, pointing out that the court of appeals had sustained its similar ruling at the first trial and that it did "not find any additional showing" of particularized need. The court observed that an *in camera* examination of the minutes would unduly prolong the trial and said, "I am not going to spend my nights reading FBI statements or Grand Jury minutes. I am going to rest, because I am tired after one of these days." The court noted on the following day that no showing had been made "up to this point," but that "[s]hould it develop that such a need is shown to the Court, the Court will examine the minutes in camera and will deliver to the defendants any portions of such minutes as the Court feels they are entitled to under the applicable law" (R. 66).[16]

2. *Bobby Fikes.* Fikes, a member of the Communist Party from 1948 to 1951, rejoined the party following a 1953 request of the F.B.I. and remained a member until 1959 (R. 209). Fikes said that he attended

[16] At this point the court said: " * * * I suggest you retain them; have them available in the event there is any need, as I have suggested for the production of those minutes is shown and the Court will ask you to produce them for the Court's *in cameran* (sic) inspection. That same general ruling would apply, of course, to the testimony of any witnesses who may have testified before the Grand Jury and who testify here, too" (Tr. 109–110).

a meeting in 1949 in Bessemer, Alabama, which was also attended by petitioner Wilson, Alton Lawrence and Jose Hudson, a Communist Party functionary. A subject discussed at the meeting was the union's compliance with Section 9(h) of the Taft-Hartley Act. Fikes testified that Hudson said that union officials were to comply with the Act by resigning from the Communist Party "on paper only." He also testified that petitioner Wilson agreed to comply with this policy (R. 213–217).

The defense had copies of 1953 and 1955 F.B.I. interviews with the witness (R. 267), a 1958 statement (Tr. 531), parts of other F.B.I. reports between 1953 and 1957 containing statements approved by the witness (First Trial Tr. 488–489; R. 209), testimony before the Subversive Activities Control Board (R. 265–266) and the first trial testimony. In requesting production or *in camera* inspection of the grand jury minutes petitioner's counsel stated, "I don't think that we have anything in particular to add to the observations made after our presentation on Mr. Locke, other than it seems to us this case is an even stronger one that the possibility of inconsistencies usable for impeachment purposes is even greater here, that there are apparent inconsistencies between his testimony as given here and given at the previous trial, and, therefore, we would move for the production of the notes" (R. 256). Government counsel took the same position as had been taken with respect to Locke. The court found "there has not been shown a particularized need for the production of the Grand Jury minutes of Mr. Fikes' testimony" (R. 256).

Fikes was not cross-examined until after the completion of the testimony of Alton Lawrence, a defendant who testified for the government following his plea of *nolo contendere* entered prior to the first trial (R. 229, 1). Lawrence, who also testified about the Bessemer meeting with the Communist party functionary (R. 246–250), was not cross-examined (Tr. 476). When petitioners cross-examined Fikes, they did not question him about this meeting (R. 257–268, 270–271). In the course of his cross-examination, Fikes admitted that when he was inducted into the Army he had deliberately lied in answering a questionnaire by saying that he was not a member of the Communist party (R. 258–260). He also admitted that he had been mistaken about dates in other statements he had made (R. 261–263).

The differences between Fikes' and Lawrence's testimony concerning the 1949 Bessemer meeting are the basis of petitioners' principal claim of particularized need in this Court. Petitioner's were aware of these differences, however, after Lawrence's direct examination, but they waived their opportunity to cross-examine Lawrence and chose not to examine Fikes on this subject. Nor did they advise the trial court that inconsistencies now cited between Fikes' and Lawrence's testimony warranted examination of Fikes' grand jury testimony.

3. *Fred Gardner.* Gardner drove Travis across the Canadian border in 1951 and testified about a conversation that they had during the trip. He said, "Travis told me that he was very happy that I had come with Mine-Mill, that the Communist Party

organization in Cleveland had recommended me highly, and we also discussed his resignation from the Communist Party in relation to his problems in crossing the border. He told me that he felt that his resignation was the *case* of a great deal of his problems, because it was a public resignation and it was recognized pretty much as a subterfuge to avoid prosecution under Taft-Hartley and most people accepted the fact that he was still in the Communist party" (R. 281). Petitioners possessed copies of Gardner's testimony at the 1958 retrial of Travis which charged the substantive offense of filing false non-Communist affidavits. They also had copies of his 1960 testimony before the Subversive Activities Control Board (Tr. 632), copies of a 1955 F.B.I. report (Tr. 629) and portions of a March 1956 F.B.I. document concerning the witness (Tr. 625). At the conclusion of Gardner's direct examination defense counsel asked for the minutes, saying "we make our customary demand with respect to the Grand Jury testimony of the witness in 1956" and "our regular motion that we made on Locke, Fikes, Moralez and Mason." The court concluded that "no particularized need has been shown" and denied the request (R. 309–311).

4. *William Mason.* The fourth witness whose grand jury testimony was sought was William Mason, who died before the second trial. At the first trial the trial judge could find no evidence of any "particularized need" for the production of either his 1954 or 1956 grand jury testimony (R. 176, 207). At the second trial, the court permitted Mason's first trial testimony to be read to the jury under the procedure

approved by this Court in *Mattox* v. *United States*, 156 U.S. 237 (R. 91). Petitioners' claim that the first trial testimony was not admissible because they had not had the opportunity to examine Mason with regard to his grand jury testimony was properly rejected.[17]

As in the case of the other witnesses, petitioners had numerous other statements made by Mason. These included May 1954 testimony before the NLRB which covered conversations that Mason had with Travis in 1949 (R. 180–185). See *Leedom* v. *International Union of Mine, Mill & Smelter Workers*, 352 U.S. 145. It also included his testimony at Travis' trials in 1955 and 1958 (R. 180), and statements made in 1954 and 1955 (R. 171). In light of this mass of material, petitioners' generalized demand did not warrant the examination of the minutes of Mason's grand jury testimony.

[17] Petitioner's argument as to Mason is, we believe, an argument of an issue which this Court declined to review when it limited its grant of certiorari. Obviously the trial court could not have erred, at this second trial, in declining to order production of Mason's grand jury testimony for the purpose of cross-examining him. Hence the question with respect to grand jury minutes is the same as Question 5(b) of the petition, which related to allegedly erroneous rulings under 18 U.S.C. 3500 at the first trial with regard to statements made by Mason.

D. IF THIS COURT DISAGREES WITH THE COURT OF APPEALS' EVALUATION OF THE EFFECT OF THE DISTRICT COURT'S RULING, IT SHOULD PERMIT THE DISTRICT JUDGE NOW TO EXAMINE THE GRAND JURY TESTIMONY *"IN CAMERA"*

The court of appeals concluded that the district court's failure to examine the grand jury minutes was not reversible error, and we believe that in the peculiar circumstances of this case that conclusion was sound. On the other hand, we recognize that there is substantial force to petitioners' claims that the interest in secrecy was minimal in light of the oft-repeated testimony of the witnesses and that the arguments they now advance, if made at trial, might have suggested *in camera* inspection as an appropriate course. If this Court determines that these factors, although not presented to the trial court, warrant an examination of the grand jury transcript for inconsistencies, the case should be remanded to the district court for the trial judge's examination of the grand jury minutes.

In *United States* v. *Giampa*, 290 F. 2d 83 (C.A. 2), when the Second Circuit established its rule that the trial court must examine grand jury testimony on demand, it did not reverse the conviction but followed its earlier decision in *United States* v. *Spangelet*, 258 F. 2d 338 (C.A. 2), and ordered the trial judge to examine the grand jury testimony *in camera* and to certify whether there were material inconsistencies. The trial court was also ordered to transmit the sealed grand jury testimony to the court of appeals where his decision could be reviewed. This procedure was followed in *United States* v. *Micele*, 327

F. 2d 222, 226–227 (C.A. 7). See, also, *Campbell* v. *United States*, 365 U.S. 85, 99.

In view of the considerations discussed above, we urge this Court to adopt a similar procedure if it believes that the trial court was under a duty to examine the grand jury testimony. This course is particularly appropriate in a case such as this one where the trial judge indicated that he would examine the minutes if the defense showed a particularized need.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney General.

NATHAN LEWIN,
Assistant to the Solicitor General.

KEVIN T. MARONEY,
GEORGE B. SEARLS,
SIDNEY M. GLAZER,
Attorneys.

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